

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
3                   MARSHALL DIVISION  
4  
5       ASHLEY HARVEY, INDIVIDUALLY    )  
6       AND AS NEXT FRIEND OF L.H.,    )  
7       A MINOR,                            )  
8       PLAINTIFFS,                        )  
9       VS.                                 )  
10   )  
11       CARTHAGE INDEPENDENT SCHOOL    )  
12       DISTRICT, OTIS AMY, SCOTT       )  
13       SURRETT, AND DR. JOSEPH         )  
14       GLENN HAMBRICK,                  )  
15       DEFENDANTS.                       )  
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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 All right. This is the time set for hearing on  
4 the Defendants' motion for sanctions in the Harvey versus  
5 Carthage ISD matter. This is Civil Action 2:18-CV-164.  
6 Let me call for announcements at this time.

7 What says the Plaintiff?

8 MR. DUNNAM: The Plaintiff is ready, Judge. Jim  
9 Dunnam, Chad Dunn, Eleeza Johnson, and Andrea Mehta.

10 THE COURT: All right. What says the Defendant?

11 MR. EICHELBAUM: Defendants are ready, Your Honor.  
12 Dennis Eichelbaum, Andrea Mooney, and Scott Thomas for the  
13 Defendants.

14 THE COURT: All right. Let me hear argument on  
15 the motion.

16 Mr. Eichelbaum, this is your motion on behalf of  
17 the Defendants. I'll hear from you from the podium.

18 MR. EICHELBAUM: Thank you, Your Honor.

19 We're here over an expert testimony.

20 THE COURT: You can -- you can dispense with the  
21 background. I've read the briefing.

22 MR. EICHELBAUM: All right. Your Honor --

23 THE COURT: I know why we're here.

24 MR. EICHELBAUM: Thank you, Your Honor.

25 THE COURT: I think you all know why you're here.

1 That's why you're here on the Friday before Christmas.

2 MR. EICHELBAUM: Yes, Your Honor.

3 THE COURT: Go ahead with your argument.

4 MR. EICHELBAUM: Thank you.

5 The expert report which was sent to Mr. Dunn was  
6 not something that we had access to. We didn't have a copy  
7 of it. In comparing the two, it is very clear that the  
8 original declaration was not what the expert actually said,  
9 and if I may, I'm going to place --

10 THE COURT: You may.

11 MR. EICHELBAUM: If you'll give counsel copies.  
12 Thank you.

13 Your Honor, this is a comparison of the actual  
14 report that was turned in and just excerpts with the  
15 highlights of the most egregious.

16 The expert report went from three pages to nine  
17 pages. And going through the changes, you can see that  
18 whereas there are significant -- and, Your Honor, would you  
19 like an actual paper copy?

20 THE COURT: I can -- I can see it on the screen.

21 MR. EICHELBAUM: All right. Thank you, Your  
22 Honor.

23 Going through this, you can see that there are  
24 tremendous changes that took place, an evolution, if you  
25 would, from a very short report where the expert claimed

1 that there was negligence in failing to protect from harm  
2 one of their students, to the school administrators have a  
3 responsibility to provide a safe educational environment to  
4 all students.

5 None of this language is found in the expert  
6 report, talking about their responsibilities, claiming that  
7 the -- the superintendent, principal, and head coach failed  
8 to take a reasonable action similarly situated  
9 administrators would have reasonably --

10 THE COURT: Slow down, counsel. Slow down.

11 MR. EICHELBAUM: I'm sorry.

12 These are all things that are not found in the  
13 expert report on the right side. These actions include a  
14 thorough investigation, which would include at a minimum  
15 interviews of appropriate students and a review of  
16 electronic data, includes cell phone -- cell phones alleged  
17 to have captured or distributed the images.

18 And what has happened is the expert's report was  
19 significantly changed and fundamentally changed by the  
20 attorney. He went on to say: As the evidence I have seen  
21 suggests -- which by the way, he testified he hadn't  
22 seen -- then the administrators had a duty and  
23 responsibility to take investigative and undertake  
24 corrective and disciplinary action. Simply referring to  
25 the matter to law enforcement, as Defendants suggests, was

1 acceptable in their disclosures and pleadings -- documents  
2 he didn't look at -- is not compliant with an  
3 administrator's duties and is not what a reasonable Texas  
4 administrator would have done under the same or similar  
5 circumstances.

6           He goes on -- and I'm not going to go through each  
7 of these, but on Page 2 of this same document, he starts  
8 getting into that there's evidence that the school district  
9 administrators took action in at least one other allegation  
10 of lewd student photographs.

11           Nothing in his expert report ever talks about  
12 that. That was all added by the attorney. He says, such  
13 example, if the jury determines it occurred, demonstrates  
14 that the administrators understood their proper  
15 responsibilities, et cetera. None of that came from the  
16 expert. It all came from Mr. Dunn or his office.

17           You go on, and it says, if the jury determines  
18 that GC had previously taken nude photos, again, none of  
19 that came from the expert. This all came from the  
20 attorney. It went from a three-page document to a  
21 nine-page document. Then talking about law enforcement on  
22 the next page.

23           Then what you see is that he started to  
24 significantly alter the actual testimony. And what I've  
25 done is I've highlighted where he adds here: It went from

1 it is once again negligence -- which by the way, if it's  
2 negligence, there's no liability for the school district.  
3 But what the attorney does is he changes it from negligence  
4 to a deviation from an administrator's duty. Then he says,  
5 thus creating a greater likelihood that similar conduct  
6 could go unpunished in the future. Then he adds language  
7 like, that the discriminatory policies exist in practice,  
8 something the expert never said, talking about and  
9 exacerbated the situation and harm. Again, things the  
10 expert never said.

11 And then, finally, if we go to the last page where  
12 he changes it from gross negligence to thereby violating  
13 their duties and public administrators of a public school  
14 district and high school in Texas. And then talking about  
15 the football championship and things, which are factually  
16 not correct, as well as because he was a JV quarterback.  
17 He wasn't on the varsity when they won the state  
18 championship, the year that -- that all this happened.

19 Now, according to the Defendants, they're allowed  
20 to -- and I agree, an attorney's duty is to look over an  
21 expert's report and to make sure it's in proper format, but  
22 the cases that they cited are not cases that say that they  
23 can rewrite the report.

24 They cite the Zoch case, which the lawyer  
25 translated from German so that the jury could understand

1 it. Well, that's -- that's fair. He didn't significantly  
2 change it; he translated it.

3 There's another case where he cites, the Tech  
4 Pharmacy case, where he -- the attorney had to write in a  
5 format that would make sense because it was written by an  
6 auto mechanic. He wasn't very educated.

7 We have Dr. Huff who has a doctoral -- he's an  
8 educator. He knows how to write his own reports. He  
9 doesn't need an attorney to rewrite it.

10 And then, finally, the Sietz case, which talks  
11 about there are numerous communications going back and  
12 forth between the person who is writing the expert report  
13 and the attorney, making suggestions, making changes,  
14 modifying the content. That's not what happened here.

15 According to the expert, he wrote his report, he  
16 spoke to the Plaintiff mother, he's not sure if he talked  
17 to the daughter, and then he sent the report to Mr. Dunn.  
18 Mr. Dunn then retyped it, which he had to because he  
19 couldn't send it in Word format, he sent it -- he took  
20 photos of it, apparently, and sent it to him. So he had  
21 retype it. That's fair.

22 But it went from three to nine pages and added all  
23 this content. And what he testified to was he simply  
24 signed it. And he even admits in his emails afterwards,  
25 which Mr. Dunn puts in, that I shouldn't have signed it.



1 Now, what happened here is --

2 THE COURT: Let me ask you this, counsel.

3 MR. EICHELBAUM: Yes, Your Honor.

4 THE COURT: How do you come up with 400 questions  
5 about a nine-page report? I regularly have cases in this  
6 court with two and 300-page expert reports, and they don't  
7 get 400 questions on a deposition.

8 MR. EICHELBAUM: Well, I didn't get to use 400  
9 questions. But --

10 THE COURT: My question is --

11 MR. EICHELBAUM: Yes.

12 THE COURT: -- how do you prepare 400 questions  
13 about a nine-page report?

14 MR. EICHELBAUM: Because it wasn't simply about a  
15 nine-page report, it was also going to be about  
16 Mr. Harvey's affidavit, which came in at the end. It was  
17 also going to be about what L.H. testified to, it was also  
18 about what A.H. testified to in their depositions. It was  
19 also going to be about what Mr. Surratt and the other two  
20 testified to in their depositions, and then the whole -- I  
21 had to go into his book, his expertise --

22 THE COURT: How many hours did it take you to read  
23 his book? It's 178 pages long.

24 MR. EICHELBAUM: It was two hours, I believe.

25 THE COURT: Okay.

1 MR. EICHELBAUM: And it's highlighted and  
2 annotated.

3 I'm sorry, I don't think I brought the book with  
4 me. But I brought my questions with me if you would like  
5 me to bring them forward.

6 It took a lot of time because --

7 THE COURT: If I want something, I'll ask for it.

8 MR. EICHELBAUM: I'm sorry, Your Honor.

9 THE COURT: Go ahead.

10 MR. EICHELBAUM: This expert is the key to their  
11 case because all they have is L.H. and A.H. saying, this is  
12 what we think happened, but we didn't actually talk to  
13 anyone.

14 They had Dr. Harkrider at one point who was  
15 supposed to be an expert. Dr. Harkrider happens to be the  
16 uncle of L.H., who Plaintiff is claiming I intimidated out  
17 of being an expert because I asked for his deposition.  
18 Somehow it keeps -- gets deflected as it's always my fault  
19 whatever happens in their case.

20 So what happened was I asked for Dr. Harkrider  
21 first because these two experts are going to talk about  
22 what a reasonable school administrator should have done  
23 because that's the whole issue here is deliberate  
24 indifference and what a reasonable educator would do.  
25 That's what they have to prove under Title IX. That's the

1 only issue remaining.

2           So I had to prepare questions that were going to  
3 go into what do you do to investigate a Title IX matter, an  
4 allegation? What kind of investigation do you do with  
5 technology and cell phones? What experience do you have in  
6 doing these things? What's the difference between a  
7 principal and a superintendent because he's testifying  
8 against the superintendent also. He's testifying against  
9 the coach. What experience do you have in what a coach  
10 does? I have to go through all of those things to be able  
11 to show that he's not an expert in these areas.

12           THE COURT: Well, let me ask you this. You said  
13 that Dr. Huff was the key to the Plaintiffs' case. At the  
14 end of the deposition, Mr. Dunn withdrew Dr. Huff --

15           MR. EICHELBAUM: Yes.

16           THE COURT: -- and indicated he was not going to  
17 use him as an expert witness or any kind of witness in the  
18 case.

19           So if he's the key to the case and the Plaintiffs  
20 have withdrawn him, haven't they self-sanctioned to some  
21 degree by taking him out of the case as opposed to merely  
22 continuing the deposition and seeking to repatriate or  
23 prepare better or otherwise put him in a different position  
24 and then try to go forward with him as an expert in the  
25 case at a later date?

1           MR. EICHELBAUM: That's yet to be seen. We don't  
2 know yet because we don't know who else they're going to  
3 try to bring in in the future. We don't know what other  
4 things they're going to do. It absolutely does hurt their  
5 case that currently they don't have an expert who can  
6 testify to that.

7           But, Your Honor, the question here today is we  
8 shouldn't have had to even go down there for this  
9 deposition. Had they prepped their witness and talked to  
10 him before the deposition, they would have probably found  
11 out that he hadn't read all of those documents, that he  
12 didn't read his declaration before he signed it, and they  
13 would have pulled him so that the school district -- even  
14 if I had prepped, put my questions together, I wouldn't  
15 have had to fly down there, go through 39 minutes of  
16 deposition. It was that bad that they pulled it after 39  
17 minutes. I never had that. And they -- and say, well,  
18 okay, king's X, too bad.

19           The school district shouldn't have to pay for  
20 that. Had they prepped their witness, had they not rewrote  
21 and tried to pass off a fake declaration, then none of this  
22 would have been necessary.

23           THE COURT: Mr. Eichelbaum, I have your  
24 submissions for your airline expense --

25           MR. EICHELBAUM: Yes, Your Honor.

1 THE COURT: -- and I believe a rental car. What  
2 are you asking the Court to do here?

3 MR. EICHELBAUM: We're asking for the attorney's  
4 fees and cost associated simply with this deposition. We  
5 have brought our -- our fee statement, but the total amount  
6 is \$9,441.50 in fees, my costs, which were \$578.52, and the  
7 cost of the transcript, which was \$613.90.

8 THE COURT: All right. What else do you have for  
9 me?

10 MR. EICHELBAUM: Do you want me to address the  
11 other issues involved in his response, such as the letter  
12 that I sent Saturday to him talking --

13 THE COURT: I've read the letter.

14 MR. EICHELBAUM: Okay.

15 THE COURT: I mean, this is your motion.

16 MR. EICHELBAUM: All right.

17 THE COURT: I don't have all day, and it is a busy  
18 time of the year, but on the one hand, I'm not going to  
19 tell you what to present in your motion, but on the other  
20 hand, I'm going to give you some latitude to make sure that  
21 you've covered what you think is adequate.

22 MR. EICHELBAUM: Thank you, Your Honor.

23 Just a few more points then.

24 The Saturday letter was written based upon the  
25 Homeland Security report, which exonerates our clients.

1 We're not going to be objecting to the Homeland Security  
2 document going into court. In fact, we're going to put it  
3 in also, if necessary, because it completely exonerates our  
4 clients. I believe once you have that in front of you,  
5 you'll see that.

6           What we did was we tried to offer the Plaintiffs a  
7 life line to say, look, you didn't know it before, so now  
8 that you know it, you were relying on this to be your  
9 smoking gun. It's not your smoking gun. Let's settle this  
10 case. And we offered, as you saw in the letter, even less  
11 than what we're asking for today to just go away and  
12 separate and end the case.

13           It had nothing to do with this motion and this  
14 motion being a preemptive strike or anything like that, as  
15 he tries to deflect the purpose of this motion.

16           With regard to the certificate of conference, the  
17 reason we had to file it that day was because this Court's  
18 order said that it was the last day that we could file any  
19 motion that would require a hearing. And so we had to  
20 scramble. We didn't even have the transcript, and we  
21 supplemented, as you know.

22           But we did send a certificate of conference once  
23 we had the pleading prepared. The deposition took place on  
24 Tuesday. On Wednesday, I was in Wichita Falls leading a  
25 training, and then that evening, I had a school board

1 meeting. So I didn't get to start looking at it until the  
2 following day.

3           It all got done that day. We did the certificate  
4 of conference attempt, and, by the way, he was in -- he  
5 says he was in California, which means it was two hours  
6 earlier. He could have looked at it and responded. I  
7 apologize, I don't know his -- his schedule when he teaches  
8 his class. I don't know if it's every Thursday.

9           Apparently, according to the -- the website, it's  
10 every other Thursday. I'm not sure which Thursday those  
11 are. So it doesn't say on the website that he was teaching  
12 that day in particular. I don't -- I'm not claiming he's  
13 not telling the truth on that. I'm simply saying there was  
14 no motive of, oh, I bet he's in California, and he's  
15 teaching a class. He can't respond to the certificate of  
16 conference. I did it as soon as I could. But we still had  
17 to file it that day, so we filed the motion.

18           And with regard to the claim that -- oh, we sent  
19 it to -- a copy to everyone. The reason I sent it to him  
20 and not to the other attorneys is because he was the only  
21 one that appeared at the deposition. He was the only one  
22 who knew what his client said, and he was the one who was  
23 basically being sanctioned. And so I sent it to him for  
24 consideration and not the other attorneys because they  
25 didn't even order a copy of the transcript at the time. So

1 they wouldn't know what I was talking about.

2 THE COURT: Let's talk about your certificate of  
3 conference.

4 MR. EICHELBAUM: Yes, Your Honor.

5 THE COURT: From what I can see, you sent to  
6 Mr. Dunn an email at 4:43 p.m., and at 6:03, you filed the  
7 motion saying you hadn't been able to have any kind of  
8 communication to adequately discharge your obligation under  
9 the certificate of conference requirement.

10 MR. EICHELBAUM: Yes, Your Honor.

11 THE COURT: Did you do anything else other than  
12 send the one email at 4:43 p.m. before you filed the motion  
13 for sanctions at 6:03?

14 MR. EICHELBAUM: No, Your Honor, I didn't.

15 THE COURT: Do you think that's a -- do you think  
16 that's sufficient to meet the Court's requirements?

17 MR. EICHELBAUM: At the time, it was all that I  
18 had, Your Honor, and had I called him, he would have still  
19 been in California. So it wouldn't -- apparently, it  
20 wouldn't have mattered.

21 To me, we have communicated throughout via email.  
22 Some of the time, it's been rather quick. I usually  
23 respond quicker than he does, but he may be very busy. I  
24 understand that. There was no intent, though.

25 And, by the way, Your Honor, I -- so far in my



1 career, and granted it's only 30 something years, but I've  
2 never had someone agree to a motion for sanctions. I mean,  
3 if this were a motion for --

4 THE COURT: Oh, so we don't need a certificate of  
5 conference?

6 MR. EICHELBAUM: No.

7 THE COURT: You can just say you know what they're  
8 going to say, so I'll just not do that? Is that what  
9 you're telling me?

10 MR. EICHELBAUM: Absolutely not, Your Honor.

11 THE COURT: That sounds like what you're telling  
12 me.

13 MR. EICHELBAUM: Well, that was not the intent,  
14 Your Honor. What I'm saying is that's what I had at the  
15 time.

16 THE COURT: You didn't -- you didn't call.

17 MR. EICHELBAUM: I didn't.

18 THE COURT: You didn't try to call. You didn't  
19 leave a voicemail. You sent an email, and less than two  
20 hours later, you filed the motion saying that you had  
21 complied with the requirement to conference with opposing  
22 counsel or had done what you thought you could do?

23 MR. EICHELBAUM: I do not recall making a phone  
24 call. So the answer to that is yes.

25 THE COURT: All right. Let's get back to the

1 substance of your motion. What else do you have that you  
2 haven't presented yet?

3 MR. EICHELBAUM: That's all, Your Honor.

4 THE COURT: All right. Let me hear a response  
5 from Mr. Dunn.

6 MR. DUNN: Your Honor, I'm Chad Dunn. Mr. Dunnam  
7 was going to speak for us, but I can address it if you'd  
8 prefer.

9 THE COURT: Well, you were the person on the  
10 scene, but I'll hear -- I'll hear from the Plaintiff,  
11 however y'all want to present it.

12 MR. DUNNAM: The reason being, Judge, is I believe  
13 that Mr. Dunn, to the extent that the Court wants to hear  
14 something under oath or as an officer of the court as  
15 testimony, we thought it would be appropriate for me to  
16 make the argument and then for him to make any factual  
17 representations or answer any questions of the Court, that  
18 is the reason we thought that was the proper way to do it.

19 THE COURT: Well --

20 MR. DUNNAM: We'll do it any way --

21 THE COURT: -- if you're prepared to present it in  
22 that way, that's fine. If Mr. Dunn had presented the  
23 argument, I would not have hesitated to ask him to make  
24 representations to me from the podium as an officer of the  
25 Court, and I would have taken them as such. But however --

1   however you two want to go forward.

2               MR. DUNNAM:   We -- we're prepared either way,  
3   Judge.   We just felt like we would -- you may want us to do  
4   it in that manner, because he would be in a sense  
5   testifying, Judge.

6               THE COURT:   Well, you all decide and let me hear a  
7   response.

8               MR. DUNN:   May it please the Court.   Chad Dunn on  
9   behalf of the Plaintiffs and himself.

10              Your Honor, I think it's clear from the affidavits  
11   or declarations and other evidence that we presented that I  
12   have handled more expert reports than I can recall.   I've  
13   never had a circumstance where an expert witness showed up  
14   at the deposition and testified that they didn't receive  
15   some documents.

16              When Dr. Huff did so, I had my laptop available to  
17   me.   I immediately pulled up the email history that we  
18   submitted to the Court.   I recalled having asked  
19   Ms. Johnson to provide him the documents.   I checked the  
20   Dropbox that was there.   I ensured that the documents that  
21   the witness testified he hadn't seen were in the Dropbox.  
22   The other documents that -- that the witness denied having  
23   seen were also listed in the Dropbox.   They had not been  
24   provided to him any other way.

25              THE COURT:   Let me ask you this, Mr. Dunn.   I've

1 read your lengthy response in your declaration. Did you  
2 ever meet with Dr. Huff face-to-face before this deposition  
3 started?

4 MR. DUNN: I didn't meet with him face-to-face,  
5 no, sir.

6 THE COURT: Are you used to putting on expert  
7 witnesses who have never been an expert witness in a case  
8 in court before without meeting with them in person and --  
9 and assuring yourself that they're prepared and ready to go  
10 forward in the deposition?

11 MR. DUNN: I'm not sure I've ever presented an  
12 expert witness who had never been --

13 THE COURT: Who -- who was going to prepare this  
14 witness for the deposition, or was it all going to be done  
15 remotely?

16 MR. DUNN: It was done remotely. That was my  
17 decision, which I own the responsibility for. I talked to  
18 him extensively the night before. And he was driving in  
19 from Houston, and I would -- I think for more than half of  
20 his drive, I talked to him on the phone about his  
21 deposition.

22 But I don't have an excuse, Your Honor. I didn't  
23 meet with him in person. He was in Houston. I recently  
24 moved to Austin. And, you know, all I can do is say lesson  
25 learned here. I'll never put an expert in a deposition

1 again without meeting with him in advance of it.

2 THE COURT: Had you ever done that before?

3 MR. DUNN: No, sir. Oh, have I ever presented an  
4 expert without meeting with him? Yes, sir, many times. A  
5 lot of experts I use are in other parts of the country. I  
6 will meet with them in advance of the deposition, which I  
7 did with Dr. Huff. So I -- I didn't -- I didn't meet with  
8 Dr. Huff in advance of the day of his deposition, but prior  
9 to going into the deposition, we met out in the parking lot  
10 and discussed -- followed up on a few things that we'd  
11 talked about in our conferences that -- that morning by  
12 phone and then the day before.

13 But, yes, I presented a number of experts for  
14 depositions that I've not been with in person because  
15 they've been in other parts of the country.

16 THE COURT: Well, whether you met with him in  
17 person or whether you talked to him over the telephone, how  
18 is it that the problem with the documents delivered by  
19 Dropbox and whether he'd seen them and read them and  
20 considered them before he was deposed, how is it that  
21 didn't come up until the deposition? How is it you didn't  
22 learn until the deposition was underway that he hadn't read  
23 what you thought you'd sent him?

24 MR. DUNN: I can't explain that. We had  
25 discussed --

1 THE COURT: In -- in the conversations you had  
2 with him, you never asked him, did you get the material we  
3 sent you by Dropbox? Have you read it? Do you have any  
4 questions about it? Is there anything you want to discuss  
5 with me about that material? Apparently, that part of the  
6 conversation never took place.

7 MR. DUNN: That part of the conversation did not  
8 take place. But we did discuss some of the documents that  
9 were in the Dropbox. And so from that --

10 THE COURT: So you assumed he'd seen all the  
11 documents in the Dropbox?

12 MR. DUNN: Well, he had signed a declaration to  
13 that effect, and so I was basing my conclusion that he had  
14 seen the documents on the declaration, and I was also  
15 basing it on the fact that he had seen at least some of  
16 them because we discussed those.

17 THE COURT: What was your thinking after the break  
18 in the deposition that led you to withdraw him as a witness  
19 in the case as opposed to merely asking for more time to do  
20 more thorough preparation and then go forward with the  
21 deposition at a later time?

22 MR. DUNN: Well, I had several thoughts.

23 The first was I had seen the email traffic showing  
24 the Dropbox and had, as I mentioned, while the testimony  
25 was still undertaking, I looked up those things, and I knew

1 that he had, in fact, seen these documents.

2 And my concern was over how he answered that  
3 question, he wasn't going to have testimony that would  
4 ultimately be persuasive to a jury later on the other  
5 issues.

6 The second reason that I withdrew him is in that  
7 split sort of decision process, I had -- I had made the  
8 decision that I didn't believe I could proffer an expert  
9 who had testified inconsistently from his declaration to  
10 what he said in deposition. And so for better or worse, I  
11 made the judgment that it was my responsibility to not  
12 present him as a witness in this case.

13 I should add --

14 THE COURT: As --

15 MR. DUNN: I'm sorry.

16 THE COURT: As you stand here now, is it your  
17 intention to replace him, if possible, or is it your  
18 intention to go forward without him or someone of a similar  
19 posture as an expert witness in the case?

20 MR. DUNN: That was the piece I was about to add.

21 Also, we had questioned whether we were going to  
22 get an expert on this subject at all and were on the fence  
23 about it and didn't view it as necessary in light of Chief  
24 Hardy's testimony.

25 And Hardy himself has been a school administrator

1 in a different -- in addition to being a law enforcement  
2 officer. And Chief Hardy was to provide the testimony that  
3 Dr. Huff was to provide. So I viewed my responsibilities  
4 regardless of their impact on the case, but I also didn't  
5 view Dr. Huff as a necessary witness.

6 So in answer to the Court's question, we do not  
7 intend to offer a replacement for him. What testimony that  
8 we would have received from Dr. Huff we intend to elicit  
9 from Chief Hardy, and a bunch of that is described in the  
10 declaration we obtained for the summary judgment response.

11 THE COURT: Well, we're fast running out of time  
12 to do anything else in this case with the trial date set in  
13 early February.

14 The -- the tone of the motion seems to communicate  
15 that Dr. Huff was merely a strawman for a report that you  
16 wrote, and when the deposition took place, it became  
17 apparent that he was made of straw and didn't know anything  
18 about it.

19 From a high level, tell me -- tell me your  
20 position on that, and there's -- there's a line somewhere  
21 that we all know about between reviewing the expert's  
22 report, making sure that it's what it should be, and  
23 writing it for them and substituting your views for the  
24 expert's views and having truly a strawman expert.

25 Tell me -- tell me your response to the



1 allegations -- or if not direct allegations -- well, I  
2 think we -- we've heard direct allegations of that this  
3 morning. Tell me your response.

4 MR. DUNN: I -- Dr. Huff remains steadfastly of  
5 the opinion that the behavior of Carthage ISD in this case  
6 deviated from what reasonable school administrators would  
7 do under the same or similar circumstances.

8 I learned of Dr. Huff by a very well-respected,  
9 long-time superintendent in the Houston area.

10 When I first contacted Dr. Huff, I explained to  
11 him that we didn't want him to testify to facts. We just  
12 wanted to know if facts were true, what would be his  
13 opinions. I recommended to him to talk to my clients.  
14 Ms. Johnson arranged that conversation, which occurred.  
15 And when he called me afterwards, Dr. Huff was livid about  
16 it and was outraged about the conduct here.

17 And I viewed my edits to his report as actually  
18 toning them down. And I also was uncomfortable with  
19 Dr. Huff making representations about what had actually  
20 occurred, and I thought it -- for trial strategy reasons  
21 and several others, I thought it -- it was for the benefit  
22 to let the jury determine what actually occurred and let  
23 Dr. Huff talk about what should happen assuming these  
24 events occurred.

25 But even after I withdrew them, he was angry about

1 Carthage's behavior, was disappointed he was not going to  
2 be testifying about it, and in his email that he sent to me  
3 afterwards asked to apologize to the family.

4           So the idea that I have somehow planted Dr. Huff's  
5 views is absolutely false.

6           THE COURT: So as I understand it, what you're  
7 telling me is you would have supplied the factual basis,  
8 hypothetical or otherwise, for him to render an opinion,  
9 but what you were looking for for him was to simply to  
10 opine about a set of facts that you would profer?

11           MR. DUNN: Exactly.

12           THE COURT: And you supplied that in the report,  
13 or you supplied that portion of the report from which he  
14 would then base his opinions?

15           MR. DUNN: Well, I believe the clients provided  
16 the -- the facts to them. I mean, so the way I looked at  
17 it is our clients will testify to these events, and I  
18 wanted Dr. Huff to have heard what -- what that likely  
19 testimony would be, but --

20           THE COURT: Let's -- let's -- let me ask it  
21 another way.

22           The original genesis of this report from Dr. Huff,  
23 did he send you something in writing that you revised and  
24 sent back to him, or did you prepare a draft to begin with  
25 and send it to him for comments? Who -- who put the

1 initial words on paper here?

2 MR. DUNN: Dr. Huff. The report -- the -- you  
3 know, I call it a draft report. I, as a matter of  
4 practice, ask the expert to prepare a first draft of the  
5 report. Dr. Huff had had no experience preparing a report  
6 before. So I provided him two others used in other federal  
7 court cases. I sent him a copy of Rule 26, and I asked him  
8 after he reviewed the records I sent him and talked to my  
9 clients to take a shot at drafting the report.

10 He was reluctant to do so. He was nervous about  
11 it, and, in fact, he expressed to me that he had not  
12 written reports before and didn't know where to start, and  
13 that's why I suggested to him, I'll give you some  
14 background, but I want you to lay out what your opinions  
15 are first. You're the person who understands these things.  
16 And then we'll work together as a team to work on your  
17 report, which is what, in fact, occurred.

18 He sent his draft report. We discussed it. He  
19 said I feel like it probably needs more attention. I've  
20 never written something like this before. And so the -- me  
21 and the other lawyers involved in the case made edits to  
22 it, sent it to him. We had one or two discussions during  
23 that time frame. And then once he got the report, my best  
24 recollection is we had two more conversations before he  
25 actually signed it.

1           And then as I believe I mentioned in my affidavit  
2 or declaration, I -- when he contacted me and asked to  
3 return just the signature page, I said that I didn't think  
4 that was -- I didn't think we should do that. He should  
5 submit to me all seven pages. He did so. They were hard  
6 to read.

7           My assistant then spent several hours working with  
8 him this afternoon -- or that afternoon. At no point in  
9 time did he suggest that there was a problem with the  
10 report. Everybody knew that he had been shared these  
11 documents.

12           You know, in retrospect -- and I've seen this done  
13 in expert reports, I'm not sure if I've ever actually done  
14 it. But in retrospect, I think we could have provided him  
15 no documents and not had him talk to the Plaintiffs, and  
16 instead say, assume these facts are true, what are the  
17 responsibilities of the school administrators?

18           And, you know, perhaps that's what I should have  
19 done. This is an imperfect science, practicing law. I do  
20 the best that I can. I believe that Dr. Huff strongly  
21 holds these opinions, and I did nothing to persuade him  
22 otherwise.

23           THE COURT: What have you heard in the argument  
24 that the Court's received from Mr. Eichelbaum today that  
25 you want to either deny or draw a distinction about that I

1 should hear as a part of the argument?

2 MR. DUNN: Well, I think, just speaking freely,  
3 Your Honor, his motion is completely out of order, and the  
4 letter that he sent the Saturday morning thereafter is -- I  
5 hesitate to state an opinion on it, but it ought to be the  
6 most shocking thing that has been filed in this case to  
7 date.

8 I have not developed a final opinion as to where  
9 it sits under Rule 4.04 of the rules of disciplinary  
10 conduct or particular penal code provisions, but it struck  
11 me at the time as an effort to extract out of me money and  
12 sacrifice the rights of my clients.

13 I expressed so. I haven't developed final  
14 opinions on the letter, but I have never in my practice  
15 seen a lawyer write a letter such as that. And I believe  
16 the tone of the motion was completely out of order, and  
17 that -- that a lack of effort on behalf of Mr. Eichelbaum  
18 to get to the bottom of what had actually occurred is  
19 itself a lack of foundation for the motion.

20 And I'll be candid, I think at this point, after  
21 the last seven days and all the efforts that I've gone  
22 through to respond to these allegations, that no sanctions  
23 whatsoever are necessary.

24 But I will say this, of course I'm -- it's in the  
25 cheap seats now looking in the background, but had he

1 called me the next day, I would have offered to pay some of  
2 the travel and court reporter expenses, although I don't  
3 view it my responsibility to be the warrantor for a witness  
4 testifying to what they've already said under oath in a  
5 written document. But I would have nevertheless done so.

6           Instead, I had this motion filed on me with  
7 aspersions, little to no legal authority cited, and the  
8 central premise of it is that the lawyer somehow did  
9 something wrong by having participated in helping an  
10 expert, especially a new expert, draft the report.

11           So I deny each and every one of these allegations.

12           THE COURT: All right. Do you have anything else  
13 for me?

14           MR. DUNN: No, sir.

15           THE COURT: All right. Thank you.

16           Mr. Eichelbaum, do you have any brief follow-up  
17 for me?

18           MR. EICHELBAUM: Very brief, Your Honor.

19           If you look at the email that counsel produced  
20 from his expert, the expert talks about the fact that when  
21 I received your formal statement that was prepared --  
22 prepared for me, that's why I questioned the number of  
23 documents it listed that I reviewed.

24           So, clearly, he knew that and was asked about it  
25 back then, but today he professes he had no idea. He

1 didn't explain how the -- the significant alterations to  
2 the report, he didn't explain how the report went from  
3 three pages to nine pages with substantive content filled  
4 that never comes from Dr. Huff.

5           We hear today that he was livid. When he was in  
6 front of me, he wasn't upset. When he was being deposed,  
7 he didn't sound like he was upset with the school district  
8 or anything. We have to assume everything that Mr. Dunn is  
9 saying is true.

10           But I don't know why that is. He spoke for the  
11 expert both in his written report, as well as today. But  
12 he doesn't have anything from the expert saying this is  
13 what happened. This was my mistake. He didn't bring in an  
14 affidavit to that effect. He didn't say that these were my  
15 true opinions. He didn't do any of that from the expert.

16           You just have to accept that Mr. Dunn says it's  
17 true, so it must be true.

18           THE COURT: Let me ask you this, Mr. Dunn has told  
19 me that he doesn't intend to seek an additional expert to  
20 replace Dr. Huff in the case, but he intends to rely,  
21 apparently, to some significant degree on Officer Hardy.

22           Has Officer Hardy been deposed in the case?

23           MR. EICHELBAUM: No.

24           THE COURT: What's the status of the discovery  
25 with regard to Officer Hardy?

1 MR. EICHELBAUM: Officer Hardy was a nominal  
2 witness up until the depositions of the Plaintiffs' --  
3 well --

4 THE COURT: Yeah, don't characterize him for me.  
5 I didn't ask you to do that. I just asked has his  
6 deposition been taken? Is it being planned? It is clear  
7 now, whether he was in a different posture or not, that  
8 he's going to be a significant part of the Plaintiffs'  
9 case, and I want to know what's the status of him being  
10 deposed?

11 MR. EICHELBAUM: We're past the discovery  
12 deadline, so I have not spoken to Mr. Dunn as to whether or  
13 not he will agree to allow me to depose him.

14 All of this came about when he filed that  
15 declaration. So it has been a matter of, what, two weeks,  
16 and it came -- as I said, right after their depositions, he  
17 was a nonentity as far as we were concerned up until then.  
18 And so if we're able to depose him, we would still want to  
19 depose him, but I'm not sure we can get him in time to use  
20 him for the summary judgment reply.

21 THE COURT: All right. All right. What else do  
22 you for me?

23 MR. EICHELBAUM: Nothing further, Your Honor.

24 THE COURT: Okay. Counsel, before I forget it, I  
25 need to tell you this, I've entered an order this morning



1 with regard to the educational records that the Court's  
2 reviewed in camera.

3 I don't know if that's been delivered to you  
4 through the electronic mailing matrix yet. If it hasn't,  
5 it's on its way to you. The order I've entered this  
6 morning direct that those records be retrieved from the  
7 Court. I mentioned this so that they can be retrieved  
8 before you leave here today and save somebody a trip to  
9 come back to Marshall and get them later.

10 I have a hard copy of the order if you want to  
11 review it afterward we finish the hearing today just so  
12 there'll be no questions as to who is to do what. And I'll  
13 give a hard copy of the order to the courtroom deputy to  
14 make it available for you to review, again, to confirm what  
15 your responsibilities are with the retrieval of these  
16 records and to see that you avoid having to make a  
17 duplicative trip to get them later.

18 I have some real concerns about this case, not  
19 from a substantive standpoint, but from a professionalism  
20 standpoint.

21 I mean, I don't know that I've ever seen a  
22 complaint make as many unsubstantiated claims as this  
23 complaint does. I also don't know that I've seen  
24 correspondence between lawyers in a case that's as  
25 inflammatory as this.

1 I know this case has been to mediation once. I  
2 understand that was a very distasteful experience. The way  
3 this case is being lawyered is not at a standard that it  
4 should be.

5 I'm going to take this motion for sanctions under  
6 advisement. But I can tell you now I don't think,  
7 Mr. Dunn, you probably prepared this witness like you  
8 should have, and you've all but told me that today.

9 And, Mr. Eichelbaum, I think you smell blood in  
10 the water, and you're trying to hit a home run on something  
11 that is not a home run ball.

12 I think you're both out of bounds. And there's  
13 no need for cases to be handled like this. And if you're  
14 not already, I want to put you on notice that the Court  
15 doesn't approve of that approach to practicing law, and the  
16 Court does not want to see that continue in this case. And  
17 to the extent I do see it continue or get worse in this  
18 case, I am not at all hesitant to step in and do what I  
19 need to do to stop it. Hard fought litigation is one  
20 thing. The kind of conduct that's transpired here is  
21 another.

22 As I say, the motion for sanctions is under  
23 advisement. I'll get you a ruling as quickly as I can.  
24 And I want you to understand, I am as serious as I can be  
25 about the manner and the tone and the approach and the

1 professionalism and the civility that expect in this case.

2           And if you have any doubts about it, you need to  
3 educate yourselves by talking to lawyers that have  
4 practiced in front of me regularly as to what I expect,  
5 because I'm going to expect that of you, and right now, I'm  
6 not seeing it.

7           As a matter of fact, I'm seeing conduct that's  
8 very disturbing. We've got letters that are not extortion,  
9 but they're way over the top in the way they're written,  
10 Mr. Eichelbaum.

11           We've got lawyers talking about penal code  
12 provisions from the podium in a sanctions' motion.

13           This is not ordinary litigation style. This is  
14 not acceptable conduct. I don't know how it got to this  
15 level, but there needs to be a reset on both sides.  
16 Regardless of this motion, regardless of how this case goes  
17 forward, there needs to be a reset.

18           This matter is under advisement. You're excused.  
19 The Court stands in recess.

20           COURT SECURITY OFFICER: All rise.

21           (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes  
SHELLY HOLMES, CSR, TCRR  
OFFICIAL REPORTER  
State of Texas No.: 7804  
Expiration Date: 12/31/20

5/6/19  
Date